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Maritime Intelligence Sdn Bhd v Tan Ah Gek

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(A)-111–01 OF 2019
KAMARDIN HASHIM, LEE SWEE SENG AND RAVINTHRAN JJCA
28 DECEMBER 2020

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Labour Law — Employment — Dismissal — Company dismissed employee after domestic inquiry ('DI') found her guilty of various charges of behavioural misconduct — At no time did company raise issue over employee's qualifications for her job whether at DI or in show-cause notice to her or in her notice of dismissal — Whether company could plead and raise issue about employee's qualifications for first time before the Industrial Court which found all the misconduct charges unproven and that employee was unlawfully dismissed — Company never asserted that employee had lied, misled or misrepresented about her qualifications — Company never investigated whether employee's degree was accredited even though it had ample opportunity to do so — Whether in circumstances company was estopped from raising issue of employee's qualifications for first time before the Industrial Court — Whether even if that ground was relevant and properly pleaded company had still failed to prove the same as a ground for employee's dismissal

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The appellant ('the company') dismissed the respondent ('Tan') from her employment as Vice President for Services and Registrar of its educational institute after a domestic inquiry ('DI') found her guilty of various charges of behavioural misconduct. The charges concerned unethical behaviour, undermining the authority of a director of the company, humiliating the tea lady and bad-mouthing the academic staff. These charges were the only ones cited in the show-cause notice issued to her by the company and in the evidence led before the DI and were also the only ones contained in her notice of dismissal. However, when Tan sought relief before the Industrial Court ('IC') over her dismissal, the company for the first time raised and pleaded that her post-graduate degree was not from an accredited university, and might probably be a fake, and that therefore she could not be reinstated to her former job for which she was not qualified. The company did not, however, plead or lead evidence that Tan had defrauded or misled the company with respect to her qualifications. The IC took the view that the issue of Tan's qualifications did not warrant consideration because that was never the ground on which she was dismissed. The IC ruled that the company had failed to prove the misconduct charges against Tan and that she was wrongfully dismissed and awarded her RM288,000 as compensation in lieu of reinstatement and back wages. The High Court dismissed the company's application for judicial review and

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affirmed the IC's decision. The instant appeal was solely on the ground that the IC and the High Court were wrong not to have considered the issue over Tan's qualifications.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) There was no good reason to disturb the award of the Industrial Court as the end result, even after considering the evidence adduced by the company for the additional ground which was now the sole ground of its challenge to the award, was the same in that it did not alter the position that Tan was dismissed without just cause and excuse (see para 115).

(2) Whilst the company was not precluded from raising a new or different ground for dismissal in its pleading before the Industrial Court, the Court was entitled to exercise its discretion as to whether such new ground should be considered and the weight to be attached to it. The Court was entitled to satisfy itself as to whether the new ground was raised as an afterthought or in bad faith, the reason why it was not communicated to the workman earlier, whether the company had waived or condoned the new ground of misconduct or whether the company was estopped from raising the new ground altogether. In the instant case, the company never specifically pleaded as misconduct that Tan had defrauded the company or misrepresented or concealed information about her post-graduate degree (see paras 35–37, 72 & 80).

(3) The company had every opportunity to investigate the issue over Tan's qualifications as it was raised in the petition signed by staff of the company against her which triggered the show-cause notice, the domestic inquiry and her dismissal. The company could have probed the matter further but it did not. It could not be a misconduct to have graduated from an allegedly unaccredited university. It might have been misconduct only if Tan had lied about her post-graduate degree, but there was no pleading to that effect. If the matter of accreditation of the degree was that important to the company, it should have stated so in its job advertisement or during the interview with Tan or in its letter of employment to her (see paras 46, 57 & 64–65).

(4) This court agreed with the High Court's finding that Tan had not misled or misrepresented to the company concerning her qualifications. The evidence showed that Tan was interviewed for the position of Vice President and Registrar by a panel of five persons including the chief executive officer cum president of the educational institute and a director of the company and was offered the job then and there after the interview. After having employed Tan for more than a year until the time of her dismissal without raising any issue regarding her post-graduate degree and after having dismissed her on other grounds, estoppel applied to bar

the company from raising the issue of her qualifications for the first time before the Industrial Court. And even assuming that ground was relevant and properly pleaded and raised, the company had still failed to prove the same (see paras 100, 107 & 113–114).

[Bahasa Malaysia summary

Perayu ('syarikat tersebut') telah memberhentikan responden ('Tan') dari pekerjaannya sebagai Naib Presiden Perkhidmatan dan Daftar untuk institusi pendidikannya selepas siasatan dalaman ('SD') mendapati dia bersalah kerana pelbagai pertuduhan salah laku kelakuan. Pertuduhan-pertuduhan berkaitan kelakuan tidak beretika, melemahkan kuasa pengarah syarikat, memalukan pembuat air wanita dan mencerca staf akademik. Pertuduhan-pertuduhan tersebut hanya disebut dalam notis tunjuk sebab yang dikeluarkan kepadanya oleh syarikat dan dalam keterangan yang dikemukakan di hadapan SD dan juga hanya terkandung dalam notis pemecatannya. Walau bagaimanapun, apabila Tan memohon relief di hadapan Mahkamah Perusahaan ('MP') atas pemecatannya, syarikat tersebut untuk pertama kalinya telah menimbulkan dan dan merayu bahawa ijazah pascasiswazahnya bukan dari universiti yang tidak diiktiraf, dan mungkin palsu, dan oleh itu dia tidak dapat dikembalikan jawatan asalnya yang mana dia tidak berkelayakan. Bagaimanapun, syarikat itu tidak mempli atau mengemukakan keterangan bahawa Tan telah menipu atau menyesatkan syarikat berkenaan dengan kelayakannya. SD tersebut berpendapat bahawa isu kelayakan Tan tidak memerlukan pertimbangan kerana ia tidak pernah menjadi alasan mengapa dia diberhentikan. SD tersebut memutuskan bahawa syarikat tersebut telah gagal untuk membuktikan pertuduhan-pertuduhan salah laku terhadap Tan dan bahawa dia telah salah diberhentikan dan memberinya award RM288,000 sebagai pampasan menggantikan pengembalian semula jawatan dan tunggakan gaji. Mahkamah Tinggi telah menolak permohonan semakan kehakiman syarikat tersebut dan mengesahkan keputusan SD tersebut. Rayuan ini semata-mata atas alasan bahawa SD tersebut dan Mahkamah Tinggi telah terkhilaf kerana tidak mempertimbangkan isu kelayakan Tan.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tidak ada alasan baik untuk mengganggu award Mahkamah Perusahaan kerana akhirnya, walaupun selepas mempertimbangkan keterangan yang dikemukakan oleh syarikat tersebut untuk alasan tambahan yang kini satu-satunya alasan untuknya mencabar award itu, ia adalah sama kerana ia tidak mengubah kedudukan yang Tan telah diberhentikan tanpa sebab atau alasan yang adil (lihat perenggan 115).

(2) Walaupun syarikat tersebut tidak dihalang daripada menimbulkan alasan baru atau berbeza kerana penolakan dalam plidingnya di hadapan Mahkamah Perusahaan, mahkamah berhak melaksanakan budi

bicaranya sama ada alasan baru patut dipertimbangakan dan beban ke atasnya. Mahkamah berhak berpuas hati sama ada alasan baru yang ditimbulkan itu suatu yang telah difikirkan kemudian atau mempunyai niat jahat, sebab ia tidak disampaikan kepada pekerjanya lebih awal, sama ada syarikat tersebut telah mengetepikan atau membenarkan alasan baru untuk salah laku atau sama ada syarikat tersebut diestopkan daripada menimbulkan apa-apa alasan baru sama sekali. Dalam kes ini, syarikat tersebut tidak secara spesifik mempli salah laku bahawa Tan telah menipu syarikat tersebut atau memberi tanggapan salah atau menyembunyikan maklumat mengenai ijazah pascasiswazahnya (lihat perenggan 35–37, 72 & 80).

(3) Syarikat tersebut mempunyai banyak peluang untuk menyiasat isu kelayakan Tan kerana ia telah dibangkitkan dalam petisyen yang ditandatangani oleh kakitangan syarikat tersebut terhadapnya yang dicetuskan oleh notis tunjuk sebab, siasatan dalam tersebut dan pemecatannya. Syarikat tersebut boleh menyiasat perkara itu dengan lebih lanjut tetapi ia tidak berbuat sedemikian. Ia bukan suatu salah laku kerana telah lulus dari universiti yang dikatakan tidak diikhtiraf. Ia mungkin salah laku sekiranya Tan telah berbohong tentang ijazah ascasiswazahnya, tetapi tiada pliding telah dibuat berkenaannya. Jika perkara mengenai pengikhtirafan ijazah itu penting kepada syarikat tersebut, ia sepatutnya menyatakan sedemikian adam iklan pekerjaannya ata semasa temuduga dengan Tan atau dalam surat pekerjaannya kepada Tan (lihat perenggan 46, 57 & 64–65).

(4) Mahkamah bersetuju dengan dapatan Mahkamah Tinggi bahawa Tan tidak mengelirukan atau memberi salah nyata kepada syarikat tersebut berkaitan kelayakannya. Keterangan menunjukkan bahawa Tan ditemuduga untuk jawatan Naib Presiden dan Pendaftar oleh panel lima orang termasuk ketua pegawai eksekutif merangkap preside institusi pendidikan dan pengarah syarikat tersebut dan telah ditawarkan pekerjaan itu sejurus selepas temuduga tersebut. Setelah mengambil Tan bekerja lebih setahun sehingga masa dia diberhentikan tanpa menimbulkan apa-apa isu berkaitan ijazah pascasiswazahnya dan selepas memecatnya atas alasan lain, estopel terpakai untuk menghalang syarikat tersebut daripada menimbulkan isu tentang kelayakannya buat pertama kali di hadapan Mahkamah Perusahaan. Malah menganggap alasan tersebut adalah relevan dan telah dipli serta ditimbulkan sewajarnya, syarikat tersebut masih gagal untuk membuktikannya (lihat perenggan 100, 107 & 113–114).]

Cases referred to

Doucet and Dauphinee v Spielo Manufacturing Incorporated and Manship 2011 NBCA 44, CA (refd)

Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111, SC (refd)
Galift (M) Sdn Bhd v Tay Keng Lock [1993] 2 ILR 169, IC (refd)
Gan Chee Ming v TN Forklift Holdings Sdn Bhd & Anor [2001] 6 CLJ 13, HC (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (folld)
Lai Cheng Wan v Vetplus Sdn Bhd [2014] 2 LNS 1239, IC (refd)
Liew Lit Yeu v SKH M & E Sdn Bhd & Anor [2019] 2 LNS 2686, IC (refd)
Lynette Mei Li Ponniah v Lasalle International Design School Sdn Bhd [2003] ILJU 103; [2003] 1 ILR 147, IC (refd)
Mohamed Noordin v Malaysia International Shipping Corporation [2006] 1 ILR 57, IC (distd)
Mohd Muhayadin Rani v RM Otomobil Sdn Bhd [2012] 1 ILR 129, IC (refd)
Mohd Rosli Shafie v Iktisas Ingenieurs Sdn Bhd [2015] 2 LNS 0788, IC (refd)
National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd (Rengam) [2000] 2 MLJ 144; [2000] 1 CLJ 681, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (folld)
Raja Nazim Raja Nazuddin v Padu Corporation [2019] 2 ILR 388, IC (refd)
Raman Perumal Thever v National Lane Finance Cooperative Society Ltd Origination Summons No R8–25–121–90 (unreported), SC (refd)
Selva Rani a/p Sinnathamby v Concorde Hotel Kuala Lumpur [2015] 2 ILJ 419; [2014] 3 ILR 658, IC (refd)
Sitt Tat Industrial Gases Sdn Bhd v Puvanendran Ganasamoorthy [2003] 2 ILR 485, IC (distd)
Sugunasegari a/p PS Suppiah v SAP Malaysia Sdn Bhd [2011] 3 ILJ 245; [2011] 2 ILR 629, IC (refd)
The City Bayview Hotel Penang, The v Eddy Samuel [2004] ILJU 65; [2004] 3 ILR 364, IC (refd)
Time Magazine Service Sdn Bhd v Ganesan R S Ramasamy [1994] 1 ILR 114, IC (refd)
Van den Boogaard v Vancouver Pile Driving Ltd 2014 BCCA 168, CA (refd)
Vivekananda Narayanasamy v MAA-Medicare Kidney Charity Fund [2016] 4 ILR 600, IC (refd)
Wong Yuen Hock v Syarikat Hong Leong Bank Assurance Sdn Bhd & another appeal [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Employment Act 1955
Government Proceedings Act 1956 s 29
Private Higher Educational Institution Act 1996 s 31(1)
Rules of the High Court 1980 O 53 r 2(3)
Specific Relief Act 1950 s 54

Appeal from: Application for Judicial Review JA-25–7–03 of 2018 (High Court, Johor Bahru)

Kanarasan Ghandinesen (Malathi Natarajan with him) (Ghandi) for the appellant.

Wong Boon Chong (Gulam & Wong) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The pivotal issue in this appeal is whether the Industrial Court was right in rejecting the ground of dismissal which was not stated in the notice to show cause issued to a workman and thus not relied on in the notice of dismissal of the workman. May a company justify the dismissal of the workman on a ground raised for the first time at the Industrial Court and not raised before in the notice to show cause and in the domestic inquiry as well as in the notice of dismissal of the workman?

[2] No evidence was thus adduced by the company against the workman at the domestic inquiry held by the company with respect to the status of the workman's postgraduate degree.

[3] The evidence before the domestic inquiry was on the various actions of the workman said to be the misconduct of undermining the authority of a director of the company, unethical behaviour, humiliating the tea lady and bad mouthing the academic staff.

[4] Suffice to say that the domestic inquiry found the charges proved and the workman was dismissed from employment on 5 February 2015.

BEFORE THE INDUSTRIAL COURT

[5] The workman referred her dismissal to the Industrial Court as the claimant there.

[6] At the Industrial Court, for the first time in its reply to the claimant's statement of case, the company had narrated that the postgraduate degree of the claimant said to have been from Newport University in the United States of America is not from an accredited university. It was not pleaded that the claimant had misled or defrauded the company with respect to stating in her CV when applying for the post of Vice President for Services and Registrar of the education institute called the Netherlands Maritime Institute of Technology, when she stated that her masters degree had been from Newport University in 1997.

[7] Learned counsel for the company stated that there were two issues before the Industrial Court ie:

(a) whether the misconduct of improper conduct of the claimant had been proved; and

(b) whether the claimant was qualified for the position she was seeking to be reinstated to.

[8] The Industrial Court rejected this ground of justifying the dismissal of the claimant as it was not stated in the notice to show cause and neither was it brought up before the domestic inquiry nor stated as a ground of dismissing the claimant in the notice of dismissal to the claimant.

[9] On the charge of improper conduct the learned chairman of the Industrial Court considered and analysed each of the alleged misconduct in detail and concluded that the company had not proved the alleged misconduct. The Industrial Court also held that the findings of the domestic inquiry panel were against the principle of natural justice as two of the panel members were ranked below the claimant. However, the chairman also found that there was contributory conduct by the claimant but that this did not warrant dismissal but instead the compensation for wrongful dismissal should be reduced accordingly. The Industrial Court awarded the sum of RM288,000 as compensation for wrongful dismissal and back wages.

[10] The company took umbrage with the award of the Industrial Court chiefly on the ground that the learned chairman had completely ignored the pleaded issue that the claimant's postgraduate qualification was not from an accredited university and that the degree is fake.

AT THE HIGH COURT

[11] The High Court saw no good reason to disagree with the Industrial Court where the findings of facts are concerned and was satisfied that the award of the Industrial Court was not infected with the infirmities of irrationality, illegality or procedural impropriety.

[12] The High Court further agreed with the Industrial Court that the company, having not raised the issue of the claimant's postgraduate degree not being issued by an accredited university in its notice to show cause and at the domestic inquiry as well as in the notice of dismissal, it cannot raise it for the first time at the Industrial Court.

[13] The High Court also held that the claimant had not misled or misrepresented the company on her qualifications.

A BEFORE THE COURT OF APPEAL

[14] The company as the appellant here before us has confined its appeal to one single ground which is that the Industrial Court had wrongly rejected and thus failed to consider the evidence led that the claimant's postgraduate degree
B from a certain Newport University is from an unaccredited university and thus a fake degree and as the company's requirement for the position of Vice President was that the candidate must have at least a postgraduate degree, the claimant was not qualified for the post.

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[15] It was further argued that the claimant as the respondent in the High Court and before us could not have been reinstated to her former position as Vice President and Registrar and hence no compensation in lieu of reinstatement could have been allowed.

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[16] In order to avoid the danger of conflating two different issues of pleading and subsequent discovery of the misconduct in a single proposition of law, we propose to consider the law as follows:

E (a) whether the company can rely on a ground for dismissal pleaded for the first time in its statement of reply and not relied on before when dismissing the workman; and

(b) whether the company can rely on a ground for dismissal so pleaded in a case where the misconduct was discovered subsequent to the dismissal
F with respect to a misconduct committed before dismissal.

Whether the company at the Industrial Court can rely on a ground pleaded for the first time in its statement of reply and not relied on before when dismissing the workman

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[17] It is admitted that the issue of the status of the claimant's postgraduate or masters degree was not raised either in the notice to show cause or at the domestic inquiry as well as not stated in the notice of dismissal as a ground of dismissing the claimant.

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[18] Learned counsel for the claimant relied on the Federal Court case of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 and in particular to the following passage as authority for the proposition that the company cannot rely on a ground not stated in the dismissal of a workman or
I relying on it for the first time before the Industrial Court as justifying the dismissal of the said workman. His Lordship Raja Azlan Shah CJ (Malaya) (as the late Royal Highness then was) had stated:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with

or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. *The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

[19] The learned High Court judge after quoting from the above passage had opined as follows in his written grounds of judgment:

[26] Based on the above authority, I find that since the only issue raised in the show cause letter and notice of domestic inquiry is that the second respondent was allegedly terminated on grounds of mere allegations of improper conduct and not on grounds of lack of qualification, I am of the view that this court therefore need not consider on this point as it was not one of the reason for the second respondent's dismissal.

[20] Learned counsel for the appellant company cautioned that the claimant's learned counsel had misread the ratio in *Goon Kwee Phoy*'s case as a closer scrutiny of the grounds of judgment would show that it was a case where the ground of dismissal, though raised for the first time before the Industrial Court, was not pleaded at all and hence cannot be allowed to be raised at the Industrial Court for that would be to breach all rules of pleadings and moreover the claimant would be unfairly taken by surprise.

[21] This was pointed out in the case of *Time Magazine Service Sdn Bhd v Ganesan R S Ramasamy* [1994] 1 ILR 114 where the Industrial Court analysed the Federal Court's case of *Goon Kwee Phoy* as follows:

... the interpretation adopted by this court as authority from *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 12 is not quite correct.

In that case, Mr Goon's services were terminated on the grounds of redundancy and this was stated in his letter of termination. Although the High Court concurred with the Industrial Court that there was no redundancy, it went on to quash the Industrial Court's decision on the grounds that the termination was in accordance with Mr Goon's contract of employment.

The statement-in-reply filed by the company in that case did not address the issue of termination in accordance with the contract. The observation made by the Federal Court is as follows:

> It appears to have escaped the notice of the company's counsel both in the High Court and before us that in its statement-in-reply to the statement of the workman's case in the Industrial Court, the company had nowhere raised the issue of lawful termination in accordance with the contract.

Subsequently, the Federal Court held as follows:

> If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out ... The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

This passage has often been quoted as being authority that the employer is limited to the reasons given in the letter of termination and cannot subsequently advance any other reasons.

His Lordship Raja Azlan Shah CJ (Malaya) (as he then was) in fact meant that employer is bound by the reason advanced by him in the pleadings and if a particular ground is not pleaded then the court cannot go into it. This is what the Federal Court said:

> We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, ...

In my view I now hold that the case of *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* is not authority for the proposition that the employer is bound only by the reasons stated in the letter of termination.

[22] A similar analysis can be found in *Sugunasegari a/p PS Suppiah v SAP Malaysia Sdn Bhd* [2011] 3 ILJ 245; [2011] 2 ILR 629 where the Industrial Court held:

> [41] In his submissions the claimant's counsel takes the position that, since the Unitem proposal was not one of the reasons given by the respondent for the claimant's dismissal, and indeed since COW1 had herself said that this did not figure in the decision making, he should 'waste no more time on it'. He cites no authority but perhaps he was having in mind *Goon Kwee Phoy*'s case. *Many have assumed that that case lays down the proposition that the court cannot go into another reason not relied on by the employer in its letter of dismissal or find one for it. Not so.* In that case the employee had had his employment terminated on the ground of redundancy. The Industrial Court held that there was no redundancy but ordered compensation to be paid in lieu of reinstatement. The company sought to quash the award. The High Court held there was no redundancy but further held that the employee's employment had been duly terminated by notice in accordance with the contract of employment, and quashed the Industrial Court's award. On appeal to the Federal Court it was held that having regard to the company's pleadings in the Industrial Court, the High Court was not correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court. *Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) did say that the Industrial Court or the High Court cannot go into another ground not relied on by the employer or find one for it, but this was in the context of the finding that the pleadings did not put forward the ground of termination by due notice.*
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> [42] *Therefore, Goon Kwee Phoy cannot be relied on as holding that the court cannot go into other grounds than those stated in the letter of dismissal.* See, also, the case of *Time Magazine Service Sdn Bhd v Ganesan RS Ramasany* [1994] 1 ILR 114 (Award No 51

of 1994) which held that *Goon Kwee Phoy* is not authority for the proposition that the employer is bound by the reasons stated in the letter of termination. Therefore, *having regard to the respondent's pleadings herein, the court takes the view that it can go into other grounds than those stated in the respondent's letter dated 16 September 2003 to determine whether the claimant's dismissal was with or without just cause or excuse.* (Emphasis added.)

[23] Learned counsel for the appellant company submitted with considerable persuasion that this matter is now settled jurisprudence before the Industrial Court as recent as *Raja Nazim Raja Nazuddin v Padu Corporation* [2019] 2 ILR 388 where the Industrial Court observed as follows:

... in a plethora of cases before the Industrial Court it has been enunciated that the court is not only confined to deliberate on the allegations of misconduct preferred against the claimant in the show cause letter but is allowed to rely on other grounds subsequently raised in the termination letter or pleaded to justify the claimant's dismissal.

[24] Learned counsel for the appellant company cited the following cases which adopted and followed the same principle as follows:

(a) *Lynette Mei Li Ponniah v Lasalle International Design School Sdn Bhd* [2003] ILJU 103; [2003] 1 ILR 147;

(b) *The City Bayview Hotel Penang, The v Eddy Samuel* [2004] ILJU 65; [2004] 3 ILR 364;

(c) *Mohd Muhayadin Rani v RM Otomobil Sdn Bhd* [2012] 1 ILR 129;

(d) *Lai Cheng Wan v Vetplus Sdn Bhd* [2014] 2 LNS 1239;

(e) *Selva Rani a/p Sinnathamby v Concorde Hotel Kuala Lumpur* [2015] 2 ILJ 419; [2014] 3 ILR 658;

(f) *Mohd Rosli Shafie v Iktisas Ingenieurs Sdn Bhd* [2015] 2 LNS 0788;

(g) *Vivekananda Narayanasamy v MAA-Medicare Kidney Charity Fund* [2016] 4 ILR 600; and

(h) *Liew Lit Yeu v SKH M & E Sdn Bhd & Anor* [2019] 2 LNS 2686.

[25] We accept that the above approach would be a fair reading of the Federal Court's case of *Goon Kwee Phoy* and this appears to have been further supported by subsequent cases where the failure to have convened a domestic inquiry is not fatal to the company's case in dismissing its workman if it could justify the dismissal at the hearing de novo in the Industrial Court. See the case of *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 and reiterated again in the case of *Wong Yuen Hock v Syarikat Hong Leong Bank Assurance Sdn Bhd & another appeal* [1995] 2 MLJ 753.

[26] Flowing from and following the defining change introduced by the above cases where the lack of a domestic inquiry is not fatal to the company as Employer, many a company have pursued the path of raising the grounds of dismissal for the first time at the Industrial Court.

[27] Subsequent awards of the Industrial Court have addressed more pointedly this issue of the right of the company or employer to raise and rely in its pleadings grounds not raised before in the letter dismissing a workman. They all seem to be quoting from the Supreme Court's decision in *Raman Perumal Thever v National Lane Finance Cooperative Society Ltd* Origination Summons No R8–25–121–90, which is not reported in the journals but has been quoted as laying down the proposition that the Industrial Court has the right to inquire into other grounds subsequently put up by the employer to justify the dismissal in its pleading.

[28] Thus for an example, and there are many, in the Industrial Court case of *Galift (M) Sdn Bhd v Tay Keng Lock* [1993] 2 ILR 169, the learned chairman said at p 172:

> The High Court case in *Raman a/l Perumal Thever v National Land Finance Co-operative Society Ltd And Industrial Court Malaysia* , Usul Pemula No R8-25-121 of 1990 ('the Society') has sanctioned the above proposition of law when it held that:
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> > The reason for termination or dismissal must be given in the notice of dismissal or termination itself, and if not so given, then the termination or dismissal is without reason.
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> > It is clear in His Lordship's view if no reason is given in the notice of termination, the Industrial Court has no right to enquire into other grounds subsequently put up by the employer to justify the dismissal. However the matter does not end there. *The Society* in the above Originating Motion was not satisfied with the High Court decision and appealed to the Supreme Court. On 2 November 1992 the Supreme Court allowed the appeal of *the Society* and overruled the High Court's decision. The law as it stands, after the Supreme Court's decision is that even if no reason or another reason is given in the notice of termination, this court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal. This court is bound by *the Society*'s case and there is no choice but to adopt the ratio decidendi of the Supreme Court.

[29] See also the following awards of the Industrial Court in *Time Magazine Service Sdn Bhd v Ganesan R S Ramasamy* [1994]1 ILR 114 and *The City Bayview Hotel Penang, The v Eddy Samuel* [2004] ILJU 65; [2004] 3 ILR 364.

[30] As the full judgment of the Supreme Court had not been quoted in any of the Industrial Court awards or court cases that had referred to it, it would be presumptuous to conclude that invariably in any and every circumstance the

company as the employer is allowed to raise a new or additional ground for the first time in its pleading before the Industrial Court.

[31] Where the company had raised other grounds in its notice to show cause and before the domestic inquiry and had also stated the grounds for dismissal in its notice or letter dismissing the workman, the Industrial Court is entitled to consider why an additional or a different ground is now being pursued by the company for the first time in the Industrial Court both in its pleadings as well as in the evidence adduced.

[32] Learned counsel for the claimant submitted that it would be grossly unfair on the claimant for the company to raise this ground as justifying her dismissal when the claimant was not given the opportunity to rebut this allegation at the domestic inquiry whether on the basis that the need for accreditation was not communicated to the claimant at all material times as a requirement for the position of vice president or that the claimant had misled the company on her postgraduate degree or that she had lied about it to the company.

[33] Instead the workman had been asked to show cause with respect to a host of other alleged improper conduct which was said to be misconduct that justified dismissal.

[34] It would be farcical to accept uncritically without examining the reason behind a company's action in having a domestic inquiry where the workman was given the opportunity to respond and defend the charges of misconduct against him and to reserve as it were 'an additional quiver of the arrow' for the inquiry at the Industrial Court in case the others have missed their mark!

[35] Whilst the company is not precluded from raising a new or different ground in its pleading in its statement of reply, the Industrial Court is always entitled, when considering the reasons for the company raising the defence of a new or different ground for the first time before it, to exercise its discretion with respect to whether it should be considered and the weight to be attached to it.

[36] The first consideration with respect to whether to consider it would entail the Industrial Court asking itself the question as to whether it was raised as an afterthought and in bad faith, especially when the claimant had raised it in the rejoinder. The second consideration as to the weight would rest on whether there had been a waiver or condonation of the particular misconduct or that the company is estopped from raising it now by its very own conduct of being silent on it when it had expressly stated other grounds.

[37] If no reasons at all had been given as in the misconduct of the workman then it can be taken to be a case where the company as employer has elected to justify its dismissal of the workman at the Industrial Court. However, if allegations had been made in the notice to show cause and in the charges framed against the workman at the domestic inquiry and in the notice or letter of dismissal, then the Industrial Court is entitled to satisfy itself as to why the new or different allegation of misconduct was not communicated to the workman earlier.

[38] Furthermore, for cases covered under the Employment Act 1955, it is a statutory requirement, unless it comes under the exemption provided, for an inquiry to be held before an employee is dismissed as provided for in s 14 as follows:

> 14 Termination of contract for special reasons
>
> (1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, *after due inquiry* —
>
> (a) dismiss without notice the employee;
>
> (b) downgrade the employee; or
>
> (c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.
>
> (2) *For the purposes of an inquiry* under subsection (1), the employer may *suspend the employee* from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:
>
> Provided that *if the inquiry does not disclose any misconduct* on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.
>
> (3) An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run. (Emphasis added.)

[39] Granted this case before us is not one where the employee or workman is covered under the Employment Act 1955 by virtue of the fact that the claimant workman's salary exceeded RM2,000 per month. However, no one can deny the fact that having a domestic inquiry before dismissing an employee would enhance industrial harmony in the workplace and affords the employee an opportunity to explain himself.

[40] The importance of the right to be heard before a workman is dismissed cannot be over-emphasised. The company may after hearing the explanation, decide not to proceed any further as the allegations raised had been sufficiently explained.

[41] It may be a case where the company was not satisfied with the explanation and so a formal domestic inquiry was constituted and the workman entitled to give his defence and to adduce evidence to exculpate himself from the allegations of misconduct.

[42] In a case where the company is not satisfied that the misconduct had not been negated and that the company had found the workman liable, it would have a range of punishments available from the lightest that of a mere warning to the heaviest that of being dismissed from employment.

[43] Where as here the company had already formulated and firmed out its various allegations of misconduct and the workman had the opportunity to counter them at both the notice to show cause stage as well as the domestic inquiry stage, it would be very strange if not suspicious as to why the company had reserved an additional ground of termination and raised it for the first time in the Industrial Court in the reply filed.

[44] The company had wanted us to believe that the misconduct in the workman having a postgraduate degree from an unaccredited university is a misconduct that they could not have discovered with reasonable diligence.

[45] That apparently was the reason why it had not raised it earlier in its notice to show cause to the workman and that no evidence was adduced in the domestic inquiry for this was not a charge framed against the workman. It therefore was not a reason for the company to dismiss the workman.

Whether the company can rely on a ground for dismissal pleaded for the first time in its statement of reply as the misconduct was discovered subsequent to the dismissal with respect to a misconduct committed before dismissal

[46] It must be stated here that the company would have every opportunity of investigating this issue as it was raised in the petition signed by disgruntled staff of the company against the claimant which had triggered the notice to show cause leading to the domestic inquiry and finally the dismissal of the claimant.

[47] There are very few reasons why the company should be allowed to bring its case against the workman by instalments as in disclosing the grounds of dismissal at the notice to show cause stage and domestic inquiry stage and if

that does not bite, to then have additional reasons reserved for its defence justifying dismissal at the Industrial Court.

[48] We appreciate that there would be those rare cases where after the dismissal of the workman his past misconduct was discovered which could not have been discovered with reasonable diligence for example perhaps where a false claim was discovered after an audit of the whole history of the workman's claim in recent years.

[49] A distinction must be made between a case where the misconduct was before dismissal and the discovery of it was after the dismissal and one where the misconduct took place after the dismissal.

[50] In the former case it may or may not be relevant depending on whether the misconduct could have been discovered with reasonable diligence and if it could, then the Industrial Court is entitled to consider the defences of a lack of bona fide and afterthought and also the defences of waiver, condonation and even estoppel operating.

[51] In *Gan Chee Ming v TN Forklift Holdings Sdn Bhd & Anor* [2001] 6 CLJ 13 at p 18, the High Court found that the alleged misconduct of an employee that happened after his dismissal is irrelevant as it could not be reason for his dismissal when. He was so dismissed as follows:

> Applying these principles to the instant case, it was clear that the Industrial Court erred in two ways. *First, it was the company's own evidence that it discovered the 'smearing' letters only after the dismissal. Therefore, even if the applicant had smeared the company before the dismissal, this cannot form the basis of dismissal.* It could only be relevant for reduction in compensation (up to a maximum of 50%). Second, *it was the company's own evidence that the applicant did not smear the company before dismissal. Therefore no misconduct took place at all! Even if the applicant smeared the company after dismissal (which was denied by the applicant), this is not a relevant issue for the Industrial Court.* Therefore, the court should not even consider reduction as there was no prior misconduct. If at all the applicant did smear the company after the dismissal this should be a civil matter and not that of the Industrial Court. (Emphasis added.)

[52] With respect to a misconduct that took place before the dismissal but which was not known to the company and hence not forming a ground for dismissal at the time when the workman was dismissed, the High Court in *Gan Chee Ming*'s case observed as follows:

> From the evidence of the company's witnesses I have no doubt *the claimant's past misconduct which the company was unaware of at the time of his dismissal, could not have formed part of the reasons for dismissing the claimant constructively. In my view, evidence of misconduct which has been discovered after an employee's dismissal is*

irrelevant and inadmissible in determining an employer's reasonableness for dismissing his employee. This is because an employee's past misconduct cannot have influenced the employer' action at the time of the dismissal. (Emphasis added.)

[53] By and large a workman would be relying on his explanations in his response to the notice to show cause and his answers to the charges framed against him in the domestic inquiry hearing for drafting his statement of case to support his contention that he had been dismissed without just cause and excuse.

[54] It is different in a case where no reasons were given at all for the dismissal and no domestic inquiry was held in which case as the claimant could only say that he had been dismissed without just cause and excuse and the field is thrown wide open for the company to plead the misconduct and the reasons for the workman's dismissal and the workman would have to refute the allegations made against him at the Industrial Court.

[55] A company that seeks to rely in its reply in the Industrial Court on a ground of dismissal not raised at the domestic inquiry would have the formidable hurdle to surmount of allegations of afterthought and bad faith and not to mention the defence of waiver and condonation as well as estoppel being raised against the company.

[56] We would venture to say that it would be very rare for the Industrial Court to admit evidence adduced to justify a ground not advanced or relied on to justify a dismissal by the company unless it falls into the category where the misconduct was discovered after the dismissal in a case where the misconduct could not have been discovered earlier with reasonable diligence. In the present case the allegation that the claimant's postgraduate degree was from an unaccredited university in the United States had already been raised in the petition signed by some lecturers of the company in the Institute which later triggered the company issuing the notice to show cause dated 6 January 2015 to the claimant.

[57] The company would have every opportunity to investigate and probe further either by writing to the relevant accreditation bodies in the United States of America where a postgraduate degree is concerned. Instead it chose not to do so and then fortuitously it stumbled across a blog-posting on doctoral degree of a certain politician who was also the Chief Minister of a certain State in Malaysia who was said to have obtained a doctorate degree from the Newport University which is said to be an unaccredited university.

[58] Both the Industrial Court and the High Court were not persuaded that this matter of the claimant's unaccredited postgraduate degree was a matter

A that could not have been discovered with reasonable diligence and indeed on hindsight it was added in as an additional ground in case the other grounds expressly relied on for dismissing the claimant could not be proved in the Industrial Court.

B **[59]** It is now confirmed in the company pursuing only this ground of appeal and abandoning all other grounds that it had spent much time and energy in shoring up the evidence both at the domestic inquiry and before the Industrial Court, only to abandon it before this court.

C **[60]** It is clearly an afterthought for the company to latch on to whatever may be of help arising from a blogpost targeting a certain politician who was also a Chief Minister.

D **[61]** We would venture to say that not all universities in the United States of America that offered their postgraduate degree here in Malaysia whether by way of distance learning or in collaboration with a local university would be keen to seek accreditation from the Malaysian authority.

E **[62]** If an employer is only prepared to employ candidates from an accredited university, it must communicate this to the candidate.

[63] The company may not be happy or impressed with a masters degree
F from the said Newport University where the quality of the degree course is concerned but that is a separate question altogether.

[64] It cannot be a misconduct to have graduated from an unaccredited university for if that is really that important to the company they should have
G stated so in their job advertisement or during the interview with the candidate or in its letter of employment to the claimant.

[65] It is a misconduct only if the claimant had lied about her postgraduate degree and there is no pleading on that allegation of lying about her degree or
H misrepresenting her qualification to the company or her having defrauded the company with respect to her qualification.

[66] The learned chairman had rejected the evidence on ground that it was
I not properly raised as a ground for dismissing the claimant and so it cannot be raised as a ground for the first time in the statement of reply.

[67] Even if the Industrial Court had allowed it to be raised for the first time in the statement of reply, the end result is the same. It had not been pleaded as

a misconduct that could not have been discovered with due diligence. We are not satisfied that it could not have been discovered with reasonable diligence.

[68] Even the cases cited by learned counsel for the appellant Company supports the distinction between a misconduct that happened before the dismissal but was hidden by the workman and that which happened after the dismissal.

[69] The British Columbia Court of Appeal in *Van den Boogaard v Vancouver Pile Driving Ltd* 2014 BCCA 168 held as follows:

> Regardless of whether dismissal for *after-acquired cause* or for cause is being argued, the issue is whether the employer can establish that, at the time of dismissal, there were facts sufficient in law to warrant a dismissal. *If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated.* (Emphasis added.)

[70] In even clearer language in *Doucet and Dauphinee v Spielo Manufacturing Incorporated and Manship* 2011 NBCA 44, the New Brunswick Court of Appeal wrote:

> In keeping with this framework, I hold there is a substantive difference between cause for dismissal based *on discrete acts of misconduct hidden from the employer, or incapable of discovery in the normal course of the employment relationship,* and acts which relate to job performance and which, with due diligence, should have been known to anyone who took the time to observe what was happening in the workplace. (Emphasis added.)

[71] We find no good reason to interfere with the decision of the learned chairman in rejecting this new allegation of the company, this being an appeal against the decision of the High Court in a judicial review matter to quash the award of the Industrial Court in finding that the dismissal of the claimant had been without just cause and excuse.

Whether the new ground of dismissing the workman in that her postgraduate degree was from an unaccredited university had been properly pleaded

[72] The requirement of a proper pleading has not been dispensed with and here it is not pleaded specifically as a misconduct or that the claimant had defrauded or misrepresented her postgraduate qualification to the company as such.

[73] The Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 reiterated that there should be strict compliance with pleadings as follows:

> ... the Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion ...
>
> The Industrial Court must scrutinise the pleadings and identify the issues; take evidence; hear the parties arguments, and finaly pronounce its judgment having strict regards to the issues.

[74] See also the Federal Court case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 761.

[75] The relevant paragraphs of the company statement of reply in encl 5 *RR* at pp 312–2 read as follows:

> 3 ... The Company avers that the appointment of the claimant was carried out by the then President/CEO of NMIT who himself was an employee of the Company. *The Company avers that he appointed the claimant without proper authorisation from the Board of directors (BOD)* of the Company purely on the ground of a pre-existing relationship with her. *He did not even verify her qualifications in that her MBA from Newport University was from a university that was not accredited in this country or any where else in the world and even its location cannot be determined.*
>
> (A copy of a report by *powerof3consultants.com* on Newport University
>
> California is annexed herewith and marked as 'CO-1'.)
>
> .....
>
> 5. It appears that Professor Malek did not verify her qualification because her resume states that she had obtained a BSc from Woodbury University which although accredited in the United States of America, is not accredited by MQA in Malaysia. *It appears further that Professor Malek did not also verify her MBA from Newport University*.
>
> (Copy of the claimant's resume is annexed hereto and marked as CO-1B.)

[76] As can be seen at para 3 of the company's statement of reply the complaint of the company was directed at its President and CEO for not getting the Board's approval for the appointment of the claimant.

[77] Surely that is an internal matter between the company and its President and CEO. After all, under the Private Higher Educational Institution Act 1996 the CEO is to be in charge of the running of the Institute and as to the need for matters to be cleared with the Board, that is an internal management matter and it has nothing to do with the postgraduate qualification of the claimant against whom nothing was raised for one year until after her dismissal at the Industrial Court for the first time.

[78] Under s 31(1) of the Private Higher Educational Institution Act 1996

every private higher education institution shall appoint a chief executive. The chief executive's duty is fully set out in s 33 thereof as follows:

> 33 The chief executive shall, subject to the provisions of this Act and the constitution of the private higher educational institution —
>
> (a) exercise general supervision over the arrangements for instruction, administration, day to day affairs, welfare and discipline in the private higher educational institution and all its branches;
>
> (b) submit to the Registrar General audited annual reports of the company in relation to the private higher educational institution it has established; and
>
> (c) provide such other information as may be required by the Registrar General from time to time for data collection.

[79] Failure on the part of the President and CEO to verify the claimant's qualification is a matter that would only be relevant if it is a condition of employment communicated to the claimant that her postgraduate degree must be from an accredited university whether in the United States of America or from the Malaysian Qualifications Agency ('MQA') in Malaysia.

[80] That had not been pleaded, much less the allegation of misconduct in that the claimant had defrauded, misrepresented or concealed this information of her unaccredited postgraduate degree from the company.

[81] Granted where evidence had been adduced though not specifically pleaded and that no injustice had been occasioned, the Industrial Court, just like the civil courts may dispense with the strict rules of pleadings. See the Court of Appeal case of *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 2 MLJ 144; [2000] 1 CLJ 681 where the issue of condonation, though not pleaded in the statement of case, had been properly considered because it had been placed and argued before the Industrial Court.

[82] However, this issue of a purported misconduct in not possessing a postgraduate degree from an accredited university in the United States of America or by the MQA was both veiled and vague and raised in such a manner for the first time in the statement of reply.

[83] Therefore we have no hesitation in rejecting this ground of appeal as the company had not pleaded it as a misconduct but more a complaint against its President and CEO in the form of a narration of events.

[84] Assuming for a moment that the issue had been properly pleaded though very much less than elegant and unequivocal we would venture to consider if based on the evidence adduced, this alleged misconduct had been proved before the Industrial Court.

Whether this court may nevertheless evaluate the evidence adduced before the Industrial court and come to its own decision

[85] Assuming for a moment that the evidence had been wrongly rejected where the issue of the postgraduate qualification and degree of the claimant is concerned, we would nevertheless proceed to evaluate the evidence that had been adduced by the company and the claimant's response before the Industrial Court.

[86] At any rate learned counsel for the appellant company had submitted in para 50 of his submission as follows:

> 50. In event this issue is to be determined in this appeal, we invite this Court to evaluate the evidence which proof (sic) that the respondent's postgraduate qualification is not valid or accredited.

[87] There is no need to send the matter back to the Industrial Court for it to hear the parties on this matter as this court is not in any disadvantageous position compared to the Industrial Court where evaluating the evidence is concerned. This is not a case where the learned chairman had disallowed the company from adducing the evidence but rather one where the evidence had been led but that the Industrial Court had rejected it and thus not considered it.

[88] If authority is required one may refer to the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia and Anor* at p 172 where Edgar Joseph Jr FCJ speaking for the majority observed as follows:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety*.
>
> But, Lord Diplock's *other* grounds for impugning a decision susceptible to judicial review make it abundantly clear that *such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinize such decisions not only for process, but also for substance.* (Emphasis added.)

[89] Even in a case where the Civil Court on a judicial review application had quashed the award of the Industrial Court, it is now permitted since the decision of *R Rama Chandran* for the Civil Court to assess damages and compensation without the need to send the matter down to the Industrial Court for this exercise.

[90] *A fortiori*, a similar approach may be taken where the consideration by the Civil Court of the factor which was not taken into consideration by the Industrial Court would yield the same result that the dismissal was without just cause and excuse.

[91] The Federal Court, in its majority decision in *R Rama Chandran* held that in appropriate cases, the High Court has the power not merely to quash the award of the Industrial Court, but to proceed to find that an employee has been dismissed from service without just cause or excuse, and when necessary, to award fair compensation. Edgar Joseph Jr FCJ had this to say at p 183:

> Having regard to the breadth of the provisions of para 1 of the Schedule of the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the Courts in Malaysia in the field of public law remedies is limited in the same manner as that of the Courts in the United Kingdom, where there are no such equivalent provisions. ... The need for such a wider power is illustrated by the case of *Chief Constable of Wales v Evans* where the House of Lords was struggling to mould the remedy to suit the justice of the case. In the event, the House granted a declaration to protect the probationary constable financially for the Chief Constable's breach of the rules of natural justice.
>
> Needles (sic) to say, if, as appears to be the case, this wider power is enjoyed by our Courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, *strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied*. (Emphasis added.)

[92] After the above decision of the Federal Court, the procedure in O 53 was amended when the whole of O 53 was substituted by the Rules of the High Court (Amendment) 2000 (PU (A) 342/2000) on 21 September 2000. O 53 r 2(3) of the Rules of the High Court 1980 was amended to expressly allow for this to obviate the necessity of sending back the case to the Industrial Court and to provide that upon 'the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant, but may dismiss the application or make any orders, including an order of injunction or monetary compensation ...'.

[93] This is preserved in the Rules of Court 2012 in O 53 r 2(3) as follows:

> (3) Upon the hearing of an application for judicial review, *the Court shall not be*

A *confined to the relief claimed by the applicant* but may dismiss the application or make any orders, including an order of injunction or *monetary compensation*:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950. (Emphasis added.)

B

[94] The claimant in her rejoinder in encl 7 *RR* at pp 616–7 pleaded as follows:

2. In reply to section 2 of paragraph 3, and paragraphs 4 to 6 of the statement of
C reply, the claimant denies the allegations herein and states that the claimant was interviewed by 4 persons, i.e. professor Malek (The President and Chief Executive Officer (CEO) of Netherlands Maritime Institute of Technology (NMIT), Dr Mohd Farhan Bin Razali (Director of the Company), Encik Azman Bin Yaacob and Encik Ismail Omar (Head of Department, Human Resources and Administration
D (as he then was)). *Immediately after the interview, in the presence of the other three interviewers, the claimant was offered the job of Vice President of Services and Registrar by Encik Azman. The accreditation of the claimant's qualifications was at all material times never an issue during the interview and appointment of the claimant. Whether the qualification should be accredited would be dependent on the Company's policies and discretion of the Company at that material time* (see reply e-mail dated 9-5-2016 from
E Malaysian Qualifications Agency annexed as T 51of the claimant's Annexure (Volume 2).

The Company had all copies of the certificates of the qualifications, including the M.B.A. of Newport University. It was also never an allegation or charge in the show cause
F letter dated 6-1-2015 (see Annexure T9). *It is not in good faith on the part of the Company to claim the President and CEO did not investigate the claimant's qualifications as this is clearly the role of Human Resource department working under the leadership of Encik Ismail Omar (as he then was) to carry out such investigation if necessary and bring the matter to the attention of the CEO and the Board* ... The performance of the claimant was also never an issue in this matter as admitted by the
G Company in section 3 of paragraph 13 of the statement of reply. The main issue in this matter was whether the claimant was wrongfully or unjustly dismissed based on the allegations of improper conduct. (Emphasis added.)

[95] First what was posted was by a writer who was not called as a witness and
H so the truth of what was stated therein had not been verified and the claimant had stated that she could not find the blogpost when she wanted to access it.

[96] We agree with learned counsel for the claimant that it is unsafe to rely on an unverified source of an alleged review by a blogger found at the website,
I *www.powerof3consultants.com* (see encl 5 RR2C at p 331). The website does not have any affiliation with any governmental body or department. The document or website page relied upon by the appellant company in COB 1 cannot be located in the website stated above (see Annexure 'B' encl 10 RR2H at p 1214 and encl 10 at p 1215). As such, little or no weight could be attached

to this particular piece of documentary evidence. We agree with the claimant's learned counsel that the proper website to inquire whether a program or course is accredited in Malaysia or otherwise would be at the MQA website, www.mqa.gov.my.

[97] The company could have written to the said Newport University to inquire if the claimant ever graduated from that university and whether or not it is accredited in the United States of America or anywhere in the world including Malaysia. It had not done so. It could also have written to the various accreditation bodies in the United States of America to inquire about the status of Newport University and the degrees it offers. No evidence of that had been produced before the Industrial Court.

[98] Second, the degree in question was not a postgraduate masters degree but a doctoral degree of a politician who at that time was also the Chief Minister of a certain State in Malaysia and the question would be whether if one programme or course is assumed to be unaccredited then would the rest of the courses offered by the same university be unaccredited as well.

[99] Third, no evidence had been adduced to say to the candidate applying for the position of Vice President and Registrar that the postgraduate degree of the candidate must be from an accredited university. Neither had the claimant stated in her CV that her postgraduate degree was from an accredited university.

[100] The claimant was interviewed for the position by a panel of five interviewers including the Chief Executive Officer (CEO) and one of the company's director. The panel had offered the claimant the job there and then after the interview. Even if that is subject to verification if her postgraduate degree was from an unaccredited university, the company for the past one year after engaging her had not seen it fit to verify the postgraduate qualification of the claimant.

[101] Fourth, the claimant had been confirmed to her position as a Vice President and Registrar of the Institute and the company had reaffirmed in its evidence before the Industrial Court that its complaint is not on her performance at all but on her conduct which it deemed to be improper as to justify her dismissal.

[102] This court is not disadvantaged in any way in considering for itself the evidence that the learned chairman of the Industrial Court had nevertheless allowed to be introduced by the company where this additional and new allegation of misconduct is concerned.

[103] The learned chairman had not assessed or evaluated this evidence as she was of the opinion that it was not relevant as it was raised for the first time in the statement of reply of the company and was not raised in the notice to show cause or before the domestic inquiry and therefore not forming part of the reasons in the notice of dismissal issued to the claimant.

[104] The High Court in agreeing with the Industrial Court had observed as follows:

> [22] Based on the above, it *clearly shows that the Second Respondent was allegedly terminated on grounds of mere allegations of improper conduct and not on grounds of lack of qualification*. The said allegation of qualification was also not stated in the findings of the domestic inquiry.
>
> [23] It is also to be noted that Dr Mohd Farhan (COW1) had agreed under the third paragraph of para 13 found at p 90 of the statement in reply (see statement in reply at exh A5 of affidavit 2) of the applicant company that the allegations is not related to her performance or qualification but more on her conduct.
>
> *Third paragraph of paragraph 13*
>
> 'The Company also avers that it would have served no useful purpose if all 32 signatories had been called to testify during the inquiry and that the claimant's performance was not the issue in this matter. It is more her conduct'
>
> ...
>
> [27] The Applicant Company is relying on the decisions of *Mohamed Noordin Mohamed v Malaysian International Shipping Corporation Bhd* [2006] 1 ILR 57 *and Sitt Tat Industrial Cases Sdn Bhd v Puvananderan Ganasamoorthy* [2003] 2 ILR 485 and argues that since the Second Respondent has misled the Applicant Company on her qualifications, the Applicant Company is justified in dismissing the Second Respondent.
>
> [28] However, I find that the decision in the case of *Mohamed Noordin Mohamed* and *Sitt Tat Industrial Gases Sdn Bhd* is of no assistance to the Applicant Company as the company in those cases had dismissed the employee based on their qualification of (sic) which was upheld by the Industrial Court.
>
> [29] In our instant case, by referring to the show cause letter, notice of domestic inquiry and the reasons for the dismissal by the applicant company, it was never an allegation by the applicant company that the second respondent lacked the qualifications. *The second respondent has never misled or misrepresented the applicant company on her qualifications*. The appointment of the Second Respondent was delegated to the President and CEO of NMIT. The second respondent was interviewed by a panel of interviewers who were the applicant company, Encik Azman, the President, and CEO of NMIT and Commander (Ret) Ismail bin Omar (COW5) who was then the HR and Admin Manager. The Second Respondent was offered the job by the Applicant Company on the spot and monthly basic salary was offered by Encik Azman.
>
> [30] Based on the above, I find the applicant's company contention on this ground is unsustainable and devoid of merits. (Emphasis added.)

[105] The High Court had referred to the case *Mohamed Noordin v Malaysia International Shipping Corporation* [2006] 1 ILR 57 where it was held that 'the claimant had thus misled the company about his professional qualifications and was therefore properly and justifiably dismissed'.

[106] In *Sitt Tat Industrial Gases Sdn Bhd v Puvanendran Ganasamoorthy* [2003] 2 ILR 485 it was held as summarised in the headnotes, that:

> [2] Pre-employment misrepresentation is a criminal offence. Being so, misrepresentation is a misconduct whereby the elements of dishonesty and deception are involved. Since the employer-employee relationship carries with it the duty of fidelity on the part of the employee and also a relationship of trust and confidence, dishonesty on the part of the employee is an attack upon the trust and confidence of the employer.
>
> [3] The claimant had provided false information and misrepresented to the company about his employment status. Therefore, the company had a reasonable and just cause not to be able to repose any further trust and confidence on the claimant. It followed that the company had just cause and excuse to dismiss the claimant.

[107] The above two awards can be distinguished as in those cases the misconduct of having misled and misrepresented one's qualification was specifically pleaded and proved. However, in the present case the High Court, in taking into consideration all relevant factors, had evaluated the evidence adduced before the Industrial Court and had stated as a matter of fact that the company was not misled by the claimant nor had the claimant misrepresented to the company on her qualifications. We could not agree more.

[108] To send the matter back to the Industrial Court would involve undue delay, costs and expense and this court is entitled to consider what had been improperly excluded by the Industrial Court. It is no different from this court exercising its discretion to consider that which the Industrial Court had failed to consider and see if there would be any difference in the findings arrived at which was that the dismissal was without proper cause and excuse.

[109] The burden of proof is always on the company where the allegation of misconduct is concerned as he who alleges must prove. The company had not furnished any proof from the relevant accreditation bodies in the United States of America where the claimant's postgraduate degree is concerned and neither had the company called the author of the blogpost on whose posting the company had concluded that the claimant's postgraduate degree was also unaccredited.

[110] As for accreditation by the MQA one can take cognisance of the fact that many overseas universities that offer their degree courses here either by way

of distant-learning or online method would not bother about obtaining accreditation from the MQA and neither are their students affected by the lack of accreditation by the MQA as most are seeking employment in the private sector where one's track record and performance are more highly prized and relevant as compared to where one's degree is obtained.

[111] In fact, the claimant had written an e-mail to the Principal Assistant Director of the MQA, Puan Rosmaliza bt Mohaidin and the MQA had replied to the claimant's email found at encl 8 *RR* at pp 805–807, in particular to questions and answers 4 and 6, as follows in its original language:

> 4. Jika program tersebut tidak diiktiraf atau tidak mendapat akreditasi di Malaysia, adakah pemilik sijil/diploma/ijazah/master/PhD tersebut tidak layak untuk di ambil bekerja di PPT [Pemberi Pendidikan Tinggi]?
>
> ... Oleh itu, pihak PPT perlu menyemak status university bagi memastikan kelayakan university tersebut diiktiraf oleh Kerajaan Malaysia. Walau *bagaimanapun bagi tujuan bekerja di PPT, itu terpulang kepada budi bicara dan polisi PPT itu sendiri.*
>
> 6. Sebagai sebuah PPT, adakah wajib bagi PPT tersebut mengambil pekerja yang status sijil pendidikan beliau sebelum ini mendapat akreditasi? Jika ya, kenapa dan jika tidak, adakah ia memberi implikasi kepada PPT?
>
> Bagi tujuan bekerja di PPT, itu terpulang kepada budi bicara dan polisi PPT itu sendiri. *MQA tidak mewajibkan akreditasi bagi program yang dijalankan namun MQA mempunyai kelebihan tersendiri seperti di jawapan no 4.* (Emphasis added.)

[112] We agree with the claimant that based on the answer by the MQA, for the purposes of employment by a company, it is dependent on the discretion and policy of that company. Accreditation by MQA of a particular course is not mandatory nor can it be said that the candidate had faked his or her postgraduate qualification or lied about it just because it had been issued by an unaccredited university.

[113] Where as here, the appellant company had not investigated and verified if the postgraduate degree was accredited when it had every opportunity to do so if indeed it was an essential prerequisite for the post, estoppel would apply and it would be too late in the day for the company to raise it for the first time before the Industrial Court after dismissing the claimant on other grounds unrelated to qualification but rather to conduct of the claimant and after having employed the claimant for more than a year with no issue on her postgraduate degree.

[114] We are of the view that even this ground of dismissing the claimant had not been proved by the company assuming that it was a relevant ground properly pleaded and raised.

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[115] We see no good reason to disturb the award of the Industrial Court as the end result even after considering the evidence adduced by the company for this additional ground, which is now the sole ground of challenge to the award, is the same in that it does not alter the position that the claimant had been dismissed without just cause and excuse.

[116] We were unanimous in finding that there was no merit in this appeal. The appeal was dismissed with costs and decision of High Court was affirmed.

[117] We ordered costs of RM10,000 here to the claimant as respondent subject to allocatur.

Appeal dismissed and High Court's decision affirmed.

Reported by Ashok Kumar